
UNITED STATES OF AMERICA

v.

ALI HAMZA AHMAD SULAYMAN AL BAHLUL

) DETAILED DEFENSE
) COUNSEL'S ANSWERS
) TO PRESIDING
) OFFICER'S QUESTIONS
) ON THE ISSUE OF
) SELF-REPRESENTATION
)
) 25 October 2004

1. Pursuant to direction of the Presiding Officer of 18 October 2004, detailed defense counsel provide the following responses to the questions presented.

2. Letters correspond to that proceeding each question posed in the 18 October message:

a. A candid consideration of the evidence and a statement by counsel concerning whether they believe any closed sessions or presentation of protected information will be necessary. Part of the answer to this issue will be an explicit statement that a closed session or presentation of protected information is, is not, or may be required.

It is our understanding that detailed defense counsel have not yet received all of the evidence in this case. Additionally, we have not interviewed any potential witnesses, have not begun a pretrial investigation, and do not know what evidence the Prosecution intends to present at trial. Further, defense counsel have no way of predicated what trial evidence will ultimately be considered "protected," and what if any "protected information" will be limited to closed sessions. Consequently, at this stage it is impossible for counsel to know whether any closed sessions will be required.

b. The procedural problem involved in having the Commission determine the issue of self-representation when the Commission has not been subject to voir dire on behalf of Mr. Al Bahlul. (That is, for the Commission to decide a question of fact or law, the Commission has to be established. Assume that for the Commission to be established it should be subject to voir dire and a decision on challenges. Who will represent Mr. Al Bahlul in this process when the question presented to the Commission is who is representing him?)

A regularly constituted court providing fundamental due process is structured so as to give it competence to address preliminary questions such as an accused's right to self-representation or representation by counsel of his own choice. Mr. al Bahlul's military commission must address his right to represent himself or be represented by counsel of his choosing before it can proceed with any other matters, including voir dire and challenges. Whether military commissions have been structured in a way to allow Mr. al Bahlul's to do so is a matter that may not be answered until long after the commission proceedings have been completed.

c. Should the Appointing Authority consider the challenges made in US v. Hamdan and US v. Hicks as reflecting the challenges of any competent counsel and use them for US v. Al Bahlul? Additionally, assuming that members originally appointed to sit on the defendant's trial were challenged and removed in the cases of Hamdan and Hicks, are those members required to be available for voir dire in US v. al Bahlul?

The Appointing Authority has already acted on this issue.

d. Is self-representation required in order to provide Mr. Al Bahlul a full and fair trial, and the authority that requires allowing the defendant to represent himself notwithstanding the current state of Commission Law?

Yes, self-representation and representation by counsel of one's choosing are fundamental rights recognized in both domestic and international law as being essential parts of a fair criminal proceeding. Any military commission rule, instruction, or order to the contrary must be considered invalid and unenforceable as it would require a process which, by definition, would violate due process and the President's mandate that military commissions be full and fair. Further discussion of this matter can be found in the Memorandum of Law filed by detailed defense counsel on 2 September and 21 October 2004, and the Reply brief filed on 8 October 2004.

e. Are current detailed defense counsel permitted or required to argue the issue of self-representation to the Commission, given Mr. Al Bahlul's expressed desire that he does not wish detailed counsel to represent him?

Current detailed defense counsel are in a very difficult position with respect to what actions they may take on Mr. al Bahlul's behalf. While counsel are detailed to represent Mr. al Bahlul, they have never been accepted by him as his representative. Mr. al Bahlul has both instructed counsel and stated in open court that counsel are to take no actions on his behalf. Under applicable rules of professional responsibility, counsel would appear to be precluded from arguing the issue of self-representation on Mr. al Bahlul's behalf.

At the same time, there appears to be no mechanism for counsel to argue an issue to the military commission in any capacity other than as representatives of an accused.

Finally, however, Mr. al Bahlul has been denied the means to effectively address this matter himself. Mr. al Bahlul has no access to legal or research material. Further, the majority of orders, instructions, and rules relevant to military commissions have not been translated into Arabic, nor have any of the numerous documents and electronic messages that have been generated on various substantive aspects of military commissions. Finally, Mr. al Bahlul has not been kept apprised of any discussions or developments that have occurred since the 26 August 2004 hearing, and expressions of concern voiced both by detailed defense counsel and the Chief Defense Counsel that Mr. al Bahlul has been unfairly frozen out of military commission matters have resulted only in assurances by the Appointing Authority that everything is fine, and that he would continue to monitor the situation.

f. If detailed defense counsel are permitted or required to represent the defendant on the limited issue of whether self-representation shall be allowed, and detailed defense counsel believe that self-representation is not in the defendant's best interests, can or should detailed defense counsel argue in favor of self-representation?

Mr. al Bahlul has a fundamental right to represent himself if he so chooses. As the United States Supreme Court recognized in *Faretta v. California*, the question is not whether others think that self-representation is the right choice, only whether an accused wishes to exercise that right.

g. If detailed defense counsel are permitted or required to represent the defendant on the limited issue of whether self-representation shall be allowed, and detailed defense counsel believe that self-representation would deprive the defendant of a full and fair trial, can or should detailed defense counsel argue in favor of self-representation?

The right of self-representation and the right to fundamental due process in a full and fair proceeding are not interchangeable, and they cannot be mutually exclusive. If Mr. al Bahlul's choice to exercise his right to represent himself means that he will be denied a fair proceeding then the military commission process must be changed. Mr. al Bahlul cannot be denied one fundamental right because the structure of military commissions would then result in the denial of another fundamental right.

h. Assuming that Mr. Al Bahlul is allowed to represent himself, what procedures might be used if there is a closed session from which the defendant is excluded and at which evidence is presented to the Commission that the Commission might consider? The answer to this issue will not be limited to only an assertion there should be no closed sessions.

Fundamental due process as well as domestic and international notions of fairness require that Mr. al Bahlul be present and allowed to represent himself during all proceedings, particularly those involving the presentation of evidence. Mr. al Bahlul chooses to exercise his right to represent himself, thus no one is available to act on his behalf in either open or closed sessions. While sessions from which the media and general public are excluded are permissible, there can be no sessions from which Mr. al Bahlul is excluded.

i. Assuming that Mr. Al Bahlul is allowed to represent himself, how would stand-by counsel be appointed and how they would communicate with Mr. Al Bahlul?

While there is presently no mechanism in place for the appointment of standby counsel, presumably the Appointing Authority, the General Counsel of the Department of Defense, or the Secretary of Defense would create a mechanism if the military commission directed such an appointment. Standby counsel could communicate with Mr. al Bahlul via the same interpreters and during similar face-to-face meetings as have previously been utilized.

j. Assuming that Mr. Al Bahlul is allowed to represent himself, how would the issues of access to evidence be handled?

Mr. al Bahlul must be allowed access to evidence. It would presumably be the responsibility of JTF-GTMO to create the mechanism for his reviewing, storing and handling such evidence in a way that does not interfere with his ability to represent himself.

k. Assuming that Mr. Al Bahlul is allowed to represent himself, is there any requirement that those matters to which the defense is entitled under Commission Law - less classified or protected information - must be translated into the defendant's language?

Pursuant to MCO No. 1 Mr. al Bahlul is entitled to have the proceedings and any documentary evidence translated into Arabic. In order to provide him a fair trial, Mr. al Bahlul is also entitled to have translated into Arabic any other matters necessary to allow him to represent himself.

l. Assuming that Mr. Al Bahlul is allowed to represent himself, is there any requirement that the accused be allowed access to that information or those sessions that he would not have access to were he being represented by detailed defense counsel under the current state of Commission Law?

In order to provide a fair process that comports with fundamental due process, Mr. al Bahlul must be allowed access to any information necessary to allow him to represent himself. He must also be allowed to be present during any military commission proceeding.

m. Assuming that Mr. Al Bahlul is allowed to represent himself, what are the consequences of, possible uses of, and ability of the Commission to consider any and all statements made by Mr. Al Bahlul, while representing himself at times when Mr. al Bahlul is not a witness?

Since Mr. al Bahlul will not be testifying under oath while representing himself, nothing he says while doing so should be admissible as evidence against him.

n. Assuming that Mr. Al Bahlul is allowed to represent himself, the methods by which Mr. Al Bahlul would be able to control his notes and other working documents given his current status and security precautions taken with detainees?

The methods by which Mr. al Bahlul will be allowed to control his notes and other working documents must be determined by JTF-GTMO and implemented in such a way as to not interfere with his ability to represent himself.

o. Any other problems or issues which might arise from allowing Mr. Al Bahlul to represent himself.

Detailed defense counsel have no thoughts on other issues that might arise from recognizing Mr. al Bahlul's right to represent himself.

/s/

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/s/

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